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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1274

WILLIAM C. KAHL, Petitioner,

v.

THOMAS BREEN, a minor, by his mother and next of friend, Jane Breen; and JAMES A. ANTON, a minor, by his parents and next of friend, William and Marie Anton, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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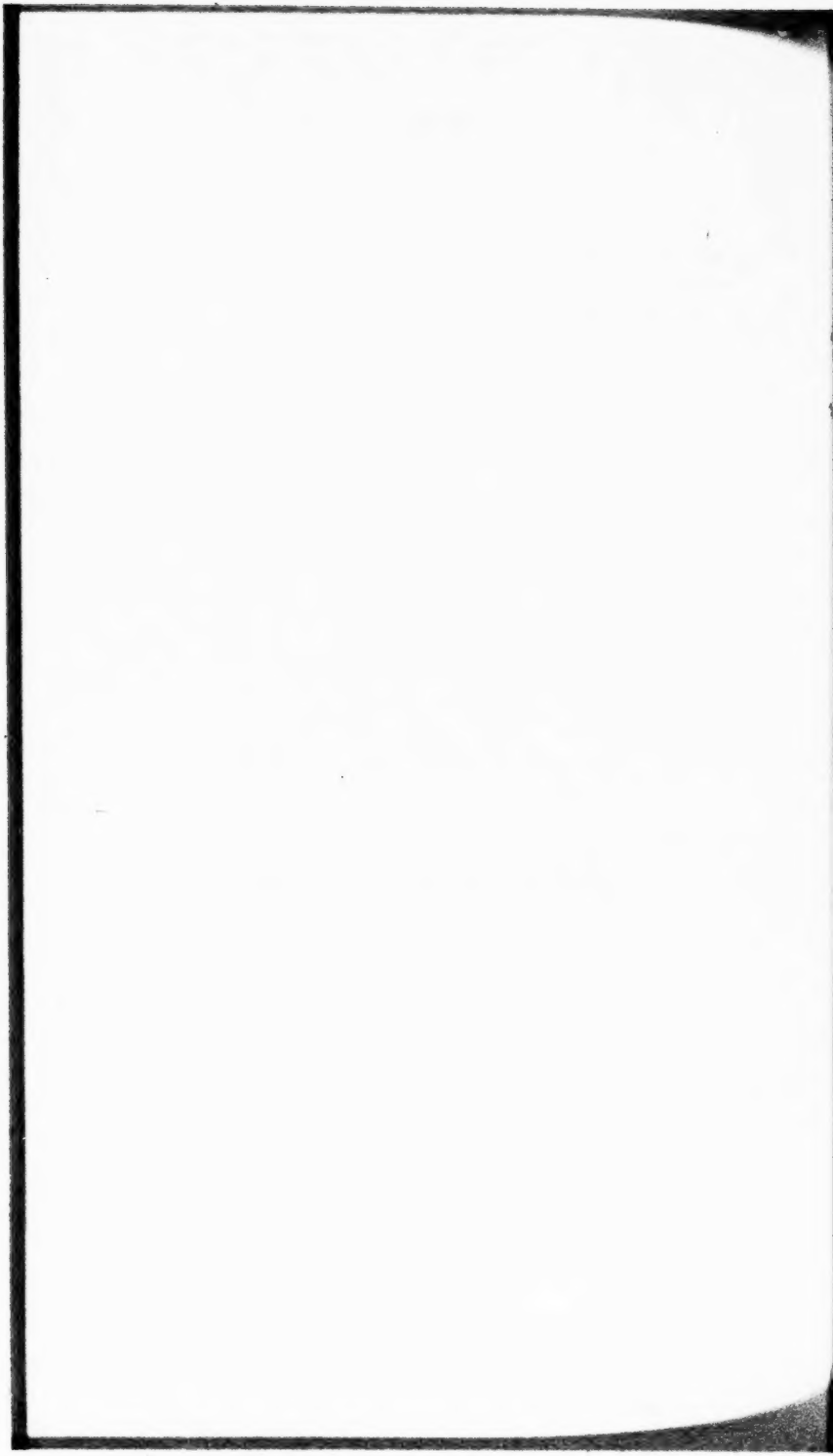

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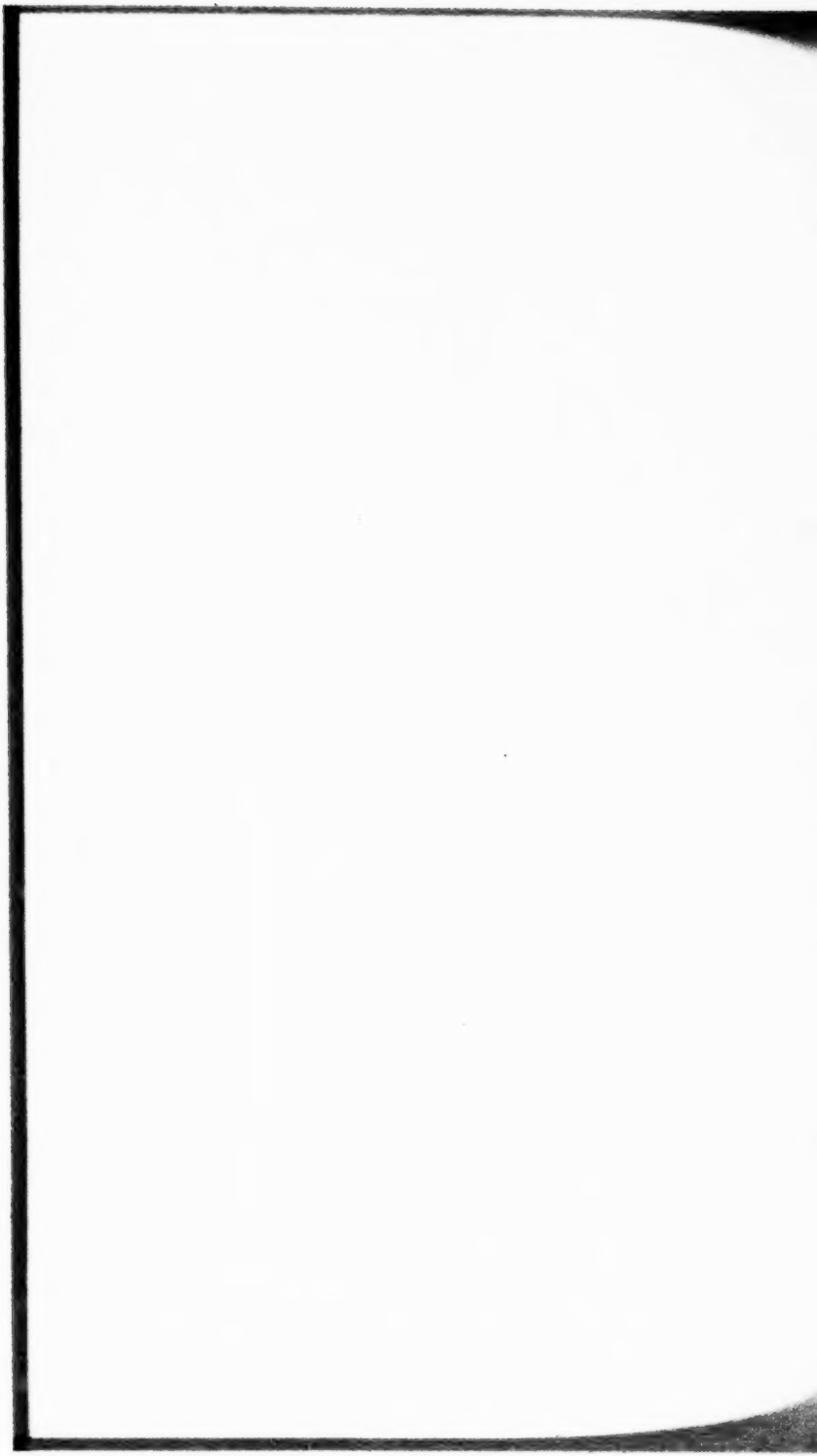
THOMAS BREEN, a minor, by his mother and next of friend, JANE BREEN; and JAMES A. ANTON, a minor, by his parents and next of friend, William and Marie Anton, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner William C. Kahl respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on December 3, 1969.



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OPINION BELOW

The opinion of the Court of Appeals and the opinion rendered by the District Court for the Western District of Wisconsin appears in the Record certified herein.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on December 3, 1969, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under Title 28 U.S.C. §1254.

QUESTIONS PRESENTED

1. Do public high school students, such as the plaintiffs here, have a personal fundamental right of free choice of grooming and dress such as the right of privacy announced for married persons in the case of Griswold v. State of Connecticut, 381 U. S. 479 (1965).

2. Is substantial justification, for public school dress and grooming rules such as in the one involved in the instant case, an element of substantive due process necessary to make such rules constitutionally valid.

3. Assuming substantial justification to be a necessary element for dress and grooming rules as here involved, is this requirement satisfied if the rules regulating the conduct or dress are not promulgated out of dislike, are not arbitrary or

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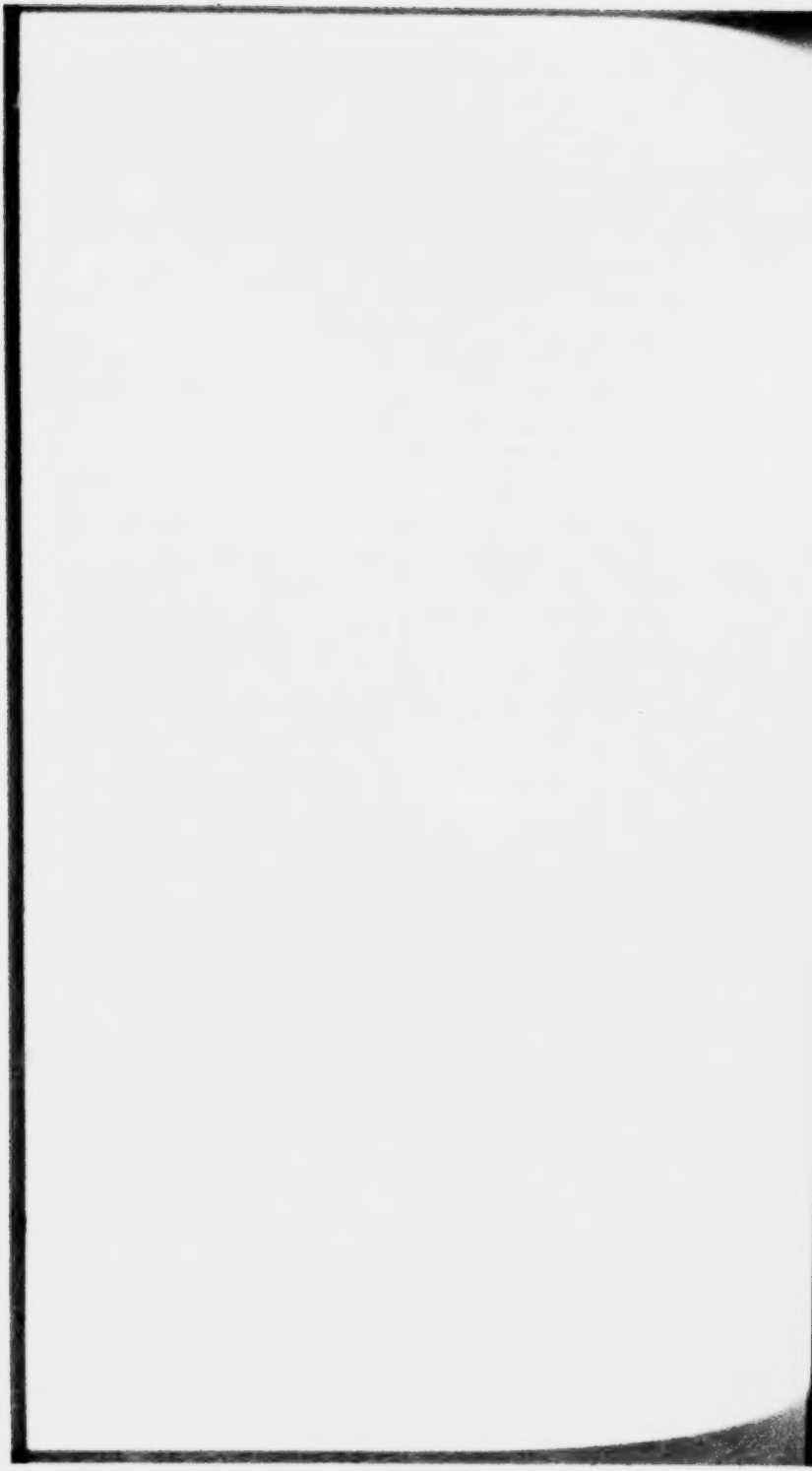
unreasonable and in the judgment of the school board is reasonably calculated to provide a proper educational environment.

4. Will a public high school rule, relating to dress, grooming or deportment, such as is here involved, require a showing that the student's activity forbidden by such rule did or will in fact substantially and materially disrupt the work and discipline of the school similar to the requirements announced in Tinker v. Des Moines Independent Community School District, 393 U. S. 503 (1969) for direct, primary First Amendment rights.

NO STATUTORY PROVISIONS INVOLVED

STATEMENT OF THE CASE

The plaintiffs, Thomas Breen and James A. Anton, were students in Williams Bay High School, a public school in Williams Bay, Wisconsin, at the commencement of the 1968-1969 school term. The appellants are the State Superintendent of Public Instruction, the members of the Williams Bay High School Board, the superintendent and principal of Williams Bay High School (App. Doc. No. 2, pp. 3-4). In the fall of 1967, the students of Williams Bay High School agreed to a dress code and adopted it as a student council policy. Hearing in District Court of January 24, 1969 (Plaintiffs' Exh. #2, pp. 59-60, 87-89). The High School Dress Code was contained in the Bulldog Student Handbook made available to students at the beginning of the 1968-1969



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school term. Hearings in District Court, December 19, 1968 (Plaintiffs' Exh. #1).

The rule regulating the length of male students' hair was contained in the Student Handbook and read as follows:

> "For boys: Hair should be washed, combed and worn so it does not hang below the collar line in the back, over the ears on the side and must be above the eyebrows. Boys should be clean shaven; long sideburns are out." (District Court Hearing, December 19, 1968; Plaintiffs' Exh. #1, p. 19).

The male students' "long hair" rule was adopted by the School Board and was not enacted because of personal dislike of long hair on the part of board members. District Court Hearing of January 24, 1969 (Plaintiffs' Exh. #2, pp. 59-60, 113-114). Both of the plaintiff students concededly violated the long hair rule by wearing their hair at a prohibited length and they were expelled from school as a result of such violations (App. Doc. No. 2, pp. 5-6).

Both students appealed their expulsions to the defendant Kahl, under the provisions of sec. 120.13 (1) (c) of the Wisconsin Statutes (App. Doc. No. 2, pp. 6,7,8). Plaintiff Anton cut his hair during the pending of his appeal to State Superintendent Kahl and he was readmitted to school (App. Doc. No. 2, p. 8). The State

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Superintendent, however, affirmed the expulsion of Thomas Breen.

As a result of the affirmance of the expulsion of Thomas Breen and the continued requirement that James Anton conform to the High School Dress Code rule regulating the length of his hair, the plaintiffs Breen and Anton brought the instant action in the Federal Court for the Western District of Wisconsin. Judgment was rendered by the District Court in plaintiffs' favor on the ground that the School Boards' rule limiting the length of male students' hair was null and void as violating the due process clause of the Fourteenth Amendment to the Constitution of the United States. The Court of Appeals affirmed the District Court decision.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISION OF ANOTHER COURT OF APPEALS AS TO THE PROPER INTERPRETATION OF THE VALIDITY OF A PUBLIC HIGH SCHOOL REGULATION OF THE LENGTH OF MALE STUDENTS' HAIR.

In reliance upon what it considered to be a violation of the due process clause of the Fourteenth Amendment to the United States Constitution, the Court of Appeals for the Seventh Circuit affirmed the District Court decision declaring null and void a rule of the School Board limiting the length of male students' hair.

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In so holding, the Court of Appeals determined that the right of a male student in a public high school to wear his hair at any length or in any desired manner is an ingredient of personal freedom designated as within the penumbras of the First Amendment, freedom of speech (See, Griswold v. State of Connecticut, 381 U. S. 479 (1965)), or encompassed within the Ninth Amendment as an additional fundamental right which exists alongside those fundamental rights specifically mentioned in the first eight amendments and applicable to the states through the due process clause of the Fourteenth Amendment (Page 5a, Appendix A).

It is submitted that the application of the Griswold standard of "substantial burden of justification," Griswold v. Connecticut, 381 U. S. at p. 505, which protects the privacy of married couples in their homes to rules of a school board regulating students' dress and length of hair is a plain misapplication of the Griswold rule. The dissenting opinion in the Seventh Circuit decision points out that in the instant case there is no evidence that the students' long hair had any penumbral characteristic similar to the Griswold holding (Page 14a, Appendix A).

It is further submitted that the Court of Appeals decision in the case at bar, by applying the Griswold rule, conflicts with the decision in Ferrell v. Dallas Independent School District, 392 F.2d 697 (1968). In the Ferrell case, at p. 703, although it was contended that a similar hair rule was an invasion of the right of privacy, the Fifth

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Circuit concluded that there was no denial of substantive due process.

The decision of the Seventh Circuit (Page 5a, Appendix A), insofar as it cites the Ferrell case as being based on disruption and student discipline problems, conflicts with that decision, 392 F.2d 703, where the Fifteh Circuit cites, approvingly, Leonard v. Attleboro, 349 Mass. 704, 212 NE2d 468 (1965) and Marshall v. Oliver, Case No. B-2932 Cir. Ct. of the City of Richmond, December 20, 1965. The Fifth Circuit in Ferrell cites both the Leonard and Marshall cases, as noted for lack of student discipline or disruption problems, with the court in both cases holding the school rule regulating length of students' hair as not unreasonable or arbitrary, in that the rule was reasonably calculated to maintain school discipline.

The facts in the present case, where the regulation was not promulgated out of dislike of board members, as noted above in the Statement of the Case, are not unlike those in Ferrell, 392 F.2d at p. 703. There, the court distinguished Zachary v. Brown, (N.D. Ala., No. 66-719, June 30, 1967, unpublished) where a hair regulation was declared invalid on the basis that it was enacted solely because the school administrators disliked what they considered exotic hair styles.

The reliance of the Court of Appeals in the case at bar on the decision in Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1968), conflicts directly with the Supreme Court in Tinker, 393 U.S. at pp. 507-508 and cited here in the dissenting opinion (Page 12a ,

Appendix A), where the Supreme Court states:

> ". . . 'The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment. Our problem involves direct, primary First Amendment rights akin to "pure speech".' "

No claim was made here that the long hair symbolized any viewpoint.

2. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING EFFORTS OF SCHOOL BOARDS TO OPERATE THE DISTRICT SCHOOLS.

The Seventh Circuit's opinion in this case reflects important policy considerations growing out of the directly opposite constitutional interpretation given a similar school rule by the Fifth Circuit in Ferrell v. Dallas Independent School District, 392 F.2d 697 (1968).

Wisconsin School Boards are empowered to make rules for the government of the schools of the district, Wis. Stats., sec. 120.13 (1) (1967). Since the enactment of the Williams Bay dress and grooming code involved in the instant case, the Wisconsin Legislature has amended sec. 120.13 (1) as "including the power to make rules pertaining to conduct and dress of pupils in order to maintain good decorum and favorable academic atmosphere." Laws of Wisconsin, 1969, ch. 301, sec. 2, effective January 11, 1970.

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At this date, there are 457 public school districts in the State of Wisconsin with a total enrollment of 980,064. Of this number, 403,986 are enrolled in the public high schools of the state. On the national level there are 18,904 public school districts with 45,480,980 students enrolled; 17,588,078 of them enrolled in the public high schools. Research Report 1969--R.15, Research Division, National Education Association, Washington, D. C.

If the rule is held to be that a school board has a "substantial burden of justification" of a dress code or grooming rule to validate its enactment, then this Court should set forth appropriate guidelines for school boards in the Seventh Circuit and the rest of the nation to follow in that regard.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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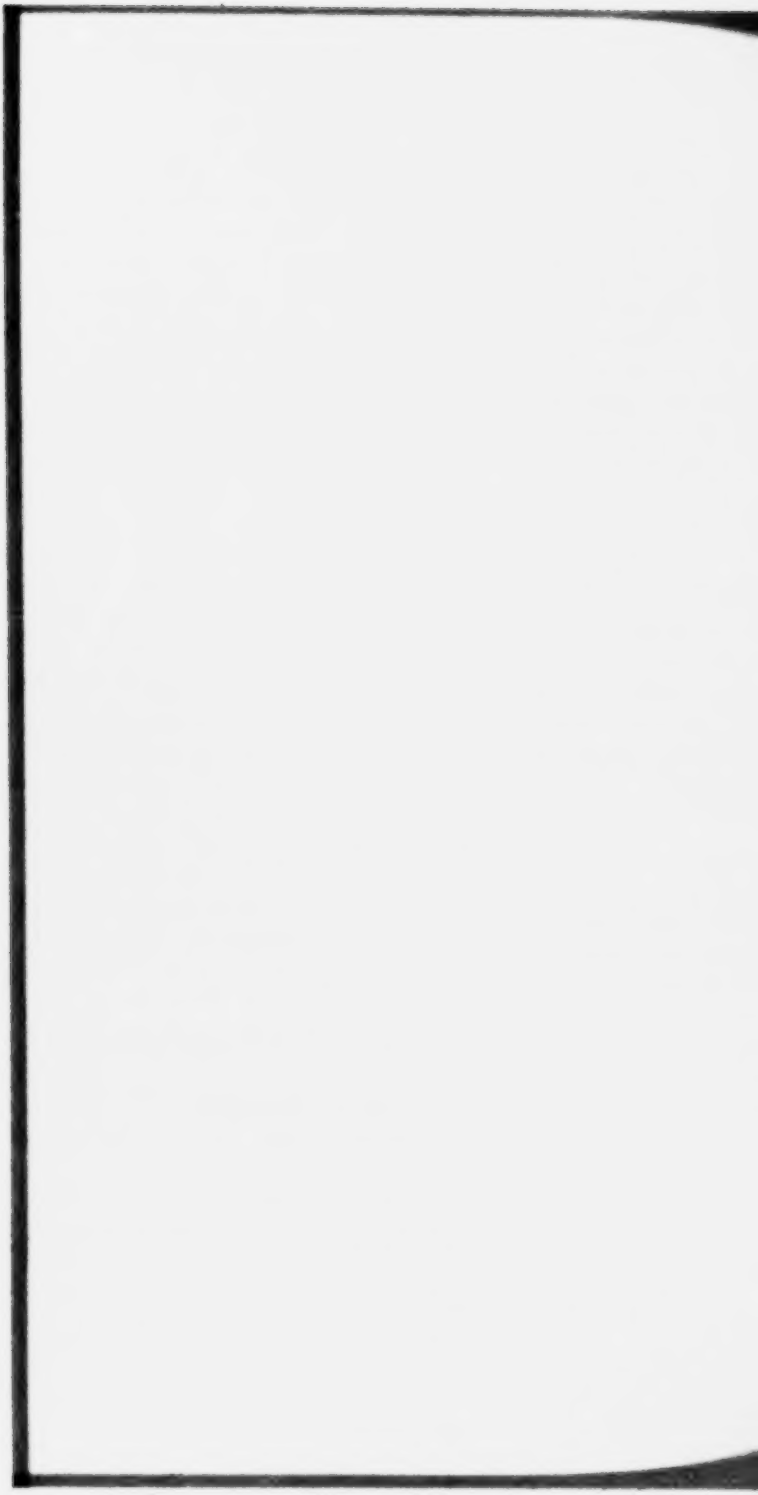
Department of Public
Instruction
Counsel for Petitioner



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APPENDIX

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1969--SEPTEMBER SESSION, 1969

NOS. 17552, 17553

THOMAS BREEN, a minor, by his mother and next friend, JANE BREEN; and JAMES A. ANTON, a minor, by his parents and next friends, WILLIAM and MARIE ANTON,

Plaintiffs-Appellees,
v.

WILLIAM C. KAHL, individually and as State Superintendent of Public Instruction of the State of Wisconsin; DAVID HAWLEY, individually and as Principal of Williams Bay High School; ARNO D. WEHLE, individually and as Superintendent of Williams Bay Schools; ROBERT R. BROWN, individually and as a member of the Williams Bay Board of Education;

Appeal from the United States District Court for the Western District of Wisconsin.

ELMER M. HANSEN, individually and as a member of the Williams Bay Board of Education; MARILYN PRUGH, individually and as a member of the Williams Bay Board of Education; HAROLD McCARTHY, individually and as a member of the Williams Bay Board of Education; ALICE MORAVA, individually and as a member of the Williams Bay Board of Education,

Defendants-Appellants.

December 3, 1969

APPENDIX A

17552, 17553 3a

Before DUFFY, Senior Circuit Judge and FAIRCHILD and KERNER, Circuit Judges.

KERNER, Circuit Judge. Plaintiffs-appellees, Thomas Breen and James Anton, filed suit under 42 U.S.C. §1983 against defendants-appellants, the State of Wisconsin's Superintendent of Public Instruction and the Members of the Williams Bay Board of Education attacking as unconstitutional the Williams Bay High School dress code regulating the length of students' hair. The district court held the regulation unconstitutional and defendants appeal.

In September 1968, the plaintiff Breen was enrolled as an eleventh grade student, and the plaintiff Anton was enrolled as a twelfth grade student in the Williams Bay High School. During the preceding academic year, the Williams Bay Board of Education (Board) had adopted the following regulation:

> Hair should be washed, combed and worn so it does not hang below the collar line in the back, over the ears on the side and must be above the eyebrows. Boys should be clean shaven; long sideburns are out.

The plaintiffs were expelled by the Board at the beginning of the school semester in the Autumn of 1968, for the stated

reason that the length of their hair had exceeded the Board's standard. Plaintiff Anton had his hair cut to comply with the regulation and was readmitted to school. At the time of the trial below, Anton, however, desired to allow his hair to grow to a length which would be in violation of the regulation. The defendant Board members threatened him with expulsion again if he did so. Plaintiff Breen at all times refused to comply with the regulation and has been denied readmission until and unless he did comply.

Each plaintiff petitioned the defendant State Superintendent of Public Instruction (State Superintendent) for review of the expulsion order, as permitted by Wisconsin statutes. Following a hearing, the State Superintendent determined the appeal as to plaintiff Anton was moot, and found that as to plaintiff Breen, the expulsion order was warranted, and he affirmed it. Plaintiffs then brought this action in the district court, seeking a declaration that the regulation was violative of the Constitution and an injunction against its continued enforcement.

The right to wear one's hair at any length or in any desired manner is an ingredient of personal freedom protected by the United States Constitution. See Griffin v. Tatum, 300 F. Supp. 60 (M.D. Ala. 1969); Zachary v. Brown, 299 F. Supp. 1360 (N.D. Ala. 1969); Richards v. Thurston, (38 U.S.L.W. 2187 [Sept. 30, 1969])..... F. Supp. .....(N.D. Mass. 1969). Whether this right is designated

as within the "penumbras" of the first amendment freedom of speech, see Griswold v. Connecticut, 381 U.S. 479 (1965), or as encompassed within the ninth amendment as an "additional fundamental right[s]. . . which exist alongside those fundamental rights specifically mentioned in the first eight amendments" Griswold v. Connecticut, 381 U.S. at 488 (J. Goldberg concurring), it clearly exists and is applicable to the states through the due process clause of the fourteenth amendment.

To limit or curtail this or any other fundamental right, the state has a "substantial burden of justification." Griswold v. Connecticut, 381 U.S. at 505 (J. White concurring). See McLaughlin v. Florida, 379 U.S. 181, 196 (1964). The United States Supreme Court in United States v. O'Brien, 391 U.S. 367 (1968), in explaining what is meant by "substantial justification" stated:

> * * * [A] government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that interest. Id. at 377.

Although there may be different justifications for a statute which is applicable to adults and one which applies to students

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of a high school, the Constitution protects minor high school students as well as adults from arbitrary and unjustified governmental rules.

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the state must respect, just as they must respect their obligations to the state. Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1968).

The School Board specifically raised below two justifications for its hair regulation. The Board asserted that (1) a Williams Bay male high school student whose hair is longer than the Board's standard so departs from the norm that his appearance distracts his fellow students from their school work, and (2) students whose appearance conforms to community standards perform better in school. As to these two justifications, the trial judge found, and we agree that:

> Defendants here have fallen far short of showing that the distraction caused by male high school students where hair length exceeds the Board standard is so aggravated, so frequent, so general, and so persistent that this invasion of their individual freedom by the state is warranted. The same is true of defendant's showing with respect to

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> the differential in school performance between male students with long hair and those with short hair.

In addition, the trial court found that there was no showing of any other possible justification for the school regulation. "The record contains no suggestion that the length of the hair constituted a health problem or a physical obstruction or danger to any person [nor] was any disruption or disturbance caused by the length of his hair."

While we do not decide whether a valid showing of any single or combination of justifications, which the School Board did or did not raise, would be sufficient to satisfy the state's substantial burden, in the absence of a valid showing of any of these justifications, such burden is clearly not met.

The failure of appellants to sustain any burden of substantial justification distinguishes the case at bar from the situation in Ferrell v. Dallas Independent School District, 392 F. 2d 697 (5th Cir. 1968), cert. denied, 393 U.S. 856 (1968), upon which the appellant School Board heavily relies. In Ferrell, the court in upholding the constitutionality of the school regulation found that wearing of long hair by students created disturbances and problems during school hours. Although we are more inclined to agree with Judge Tuttle's dissenting opinion in Ferrell that "courts are too prone to permit a curtailment of a constitutional right of a dissenter, because

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of the likelihood that it will bring disorders, resistance or improper and even violent action by those supporting the status quo," in the case at bar there is no evidence of any disturbance created by the long hair of the students. Consequently, we are not faced with the problem of evaluating whether regardless of some disorder constitutional rights must still be protected, see Terminello v. City of Chicago, 337 U.S. 1 (1948).[1]

The appellant School Board also argues that regardless of the lack of justifications for its regulation, the disciplinary powers of the school authorities will be diminished if the Board's regulation is not upheld and these expulsions and threatened expulsions are not vindicated by the court. Although courts are reluctant to interfere with conflicts which arise in the operation of school

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[1] As the United States Supreme Court recently stated in Tinker v. Des Moines Independent Community School District, 393 U.S. at 507 (1969):

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom or on the campus, that deviates from the views of another person, may start an argument or cause a disturbance. But our Constitution says we must take this risk.

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systems, courts will interfere when such conflicts "directly and sharply implicate basic constitutional values." Epperson v. Arkansas, 393 U.S. 97, 104 (1968). To uphold arbitrary school rules which "sharply implicate basic constitutional values" for the sake of some nebulous concept of school discipline is contrary to the principle that we are a government of laws which are passed pursuant to the United States Constitution.

In addition, the doctrine invoked by the School Board of "in loco parentis" does not bolster its discipline argument. Although schools need to stand in place of a parent, in regard to certain matters during the school hours, the power must be shared with the parents, especially over intimately personal matters such as dress and grooming. Since the students' parents agree with their children that their hair can be worn long and because it would be impossible to comply with the long hair regulation during school hours and follow the wishes of the students and their parents as to hair length outside of school, in the absence of any showing of disruption, the doctrine of "in loco parentis" has no applicability. See generally, Goldstein, The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Non-Constitutional Analysis, 117 U. Pa. L. Rev. 373, 377-402 (1969).

Discipline for the sake of discipline and uniformity, is indeed not compatible with the melting pot formula which brought this country to greatness. As Judge Wyzanski stated in holding a school hair regulation unconstitutional, "in schools of general

comprehensiveness the constitutional premise is that 'from different tones comes the best tune.'" Richards v. Thurston, 38 U.S. L.W. 2187 (Sept. 30, 1969).[2]

Finally, we find unpersuasive the argument that to hold such school regulations unconstitutional would open the floodgates to litigation by students challenging all sorts of school regulations and practices. To fail to hold such arbitrary regulations unconstitutional because of fear of opening the floodgates to litigation, some meritorious and some not, would be an abdication of the judiciary's role of final arbiter of the validity of all laws, and protector of the people, young and old, from the governmental exercise of unconstitutional power.

AFFIRMED

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[2] Since we are not faced with the problem, we express no opinion as to the constitutionality of hair regulations in schools other than those of general comprehensiveness.

Nos. 17552,17553, DUFFY, Senior Circuit Judge, dissenting.

I respectfully dissent. Although no other United States Court of Appeals has done so, in a similar case, the majority of this panel embraces the opportunity to hold that a deliberate violation of the Dress and Grooming Code of the Williams Bay High School is justified because, they say, such a regulation is a violation of the United States Constitution.

The District Court in this case held that the students had a constitutional right to express their "individuality" and "individual taste" by wearing long hair in admitted violation of a published school code.

The school regulation which was deliberately violated by these two teenage students was not vague. Hence, there is no question in this case of procedural due process. However, the District Court found there was a violation of substantive due process, and the majority opinion agrees.

In the Dress and Grooming Code here under consideration, the school officials established norms of conduct in accord with prevailing norms in that area and which were accepted by all but two of the student body at Williams Bay High School.

The United States Supreme Court has not decided the points here at issue although that Court had the opportunity so to do.

In Ferrell, et al. v. Dallas Independent School District, et al., 393 F. 2d 697 (5 Cir., 1968), the Fifth Circuit was presented with a similar problem. In that case, three students of the Dallas High School claimed that a school regulation requiring them to trim or cut their hair as a prerequisite to enrollment, was a denial of due process under the Fourteenth Amendment. These boys were members of a musical group. The Court, at page 703, held: "We conclude there was no denial of substantive due process. . . ." A petition for certiorari to review this decision was denied by the United States Supreme Court. (393 U.S. 856 (1968))

Certiorari was also denied by the United States Supreme Court in Marshall, et al. v. Oliver, President of Richmond Professional Institute, et al., 385 U.S. 945 (1966) which was an unreported Virginia case which involved the wearing of long hair and beards by college students.

The majority opinion quotes from and relies on Tinker, et al. v. Des Moines Independent Community School District, et al., 393 U.S. 503 (1969) where a number of students, in violation of a School Board ruling, wore black arm bands to school to protest the war in Vietnam. While concluding that such a regulation was non-enforceable as being in violation of the First Amendment, the Supreme Court specifically noted (393 U.S. at 507-8): "The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment. . . .

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Our problem involves direct, primary First Amendment rights akin to 'pure speech.'"

In the case at bar, these two long-haired students do not contend that their long hair symbolizes any specific viewpoint except possibly the defiance of school regulations. Of course, it may have expressed their "individuality," a point deemed to be of great importance by the District Judge.

A point emphasized by the District Court and apparently approved by my colleagues, is that there was no sufficient proof that the long hair worn by Breen was a disruptive influence. However, if Breen had gone to his classes carrying a sign which stated "I am defying school regulations as to required hair lengths", the effect would not be different. Why is formal proof necessary for something that is so obvious? All of the students were aware of the rule forbidding the boys wearing long hair and every time Breen appeared with his flowing locks, he was showing his defiance of and his contempt for the school authorities and the regulations as to hair length.

Suppose Breen required extra time each morning to comb and train his long hair. Could he demand, as a conscitutional right, and to show his individuality, that morning classes commence at 10 a.m. instead of 9 a.m.? Where is the line to be drawn? Who is the final arbiter? The majority seems to believe it is the United States District Judge, subject to possible review by this Court.

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By citing the case three times, the majority places great emphasis on the holding in Griswold et al. v. Connecticut, 381 U.S. 479 (1965). That case held that the use of contraceptives was part of marital "privacy" and therefore, within the "penumbra" of guarantees of the Bill of Rights. The Supreme Court there found the law forbidding the use of contraceptives was unconstitutionally broad and would involve difficult enforcement problems. In the case at bar, there is no evidence that appellees' long hair had any "penumbral" characteristic.

School Boards in Wisconsin have been delegated legislative authority and responsibility to enact and enforce rules and regulations governing conduct of students attending the public schools under their jurisdiction. In fact, Wisconsin Statutes vest in the local board the management of affairs of the school district. Wis. Stats. sec. 120.12 (1) (1967). The Board is empowered to make rules for the government of the schools and the district. Wis. Stats. sec. 120.13 (1) (1967).

I think the majority opinion is clearly wrong in its pronouncement "The right to wear one's hair at any length or in any desired manner is an ingredient of personal freedom protected by the United States Constitution." I assume this broad statement includes boys or girls attending High School. If so, the statement is unwarranted. Thus boys, imitating the style of the "Wild Man from Borneo" with hair unkempt and reaching down to the waist would, according to the majority opinion, have a federal

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constitutional right to defy school rules and regulations to the contrary.

I assume there are more than one hundred School Boards operating in the Western District of Wisconsin. If the District Judge is to be the arbiter of the length and style of hair and of various other items and practices included in school regulations, he will have little or no time to take care of ordinary federal district court business.

I would reverse the judgment of the District Court.

A true Copy:

Teste:

/s/ Kenneth J. Carrick
Clerk of the United
States Court of Appeals
for the Seventh Circuit.

UNITED STATES OF AMERICA, SS:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable the Judges of the United States District Court

for the Western District of Wisconsin

GREETING:

WHEREAS, lately in the United States District Court for the Western District of Wisconsin before you, or some of you, in a cause between THOMAS BREEN, a minor, by his mother and next of friend, Jane Breen; and JAMES A. ANTON, a minor, by his parents and next of friend, William and Marie Anton, Plaintiffs vs. WILLIAM C. KAHL, individually and as State Superintendent of Public Instruction of the State of Wisconsin, et al., Defendants; Civil

Action Number 68 C 201; an opinion, order and judgment was entered on the twentieth day of February, 1969.

as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Seventh Circuit by virtue of an appeal by* agreeably to the act of Congress, in such case made and provided, in fully and at large appears. *David Hawley, individually and as Principal of Williams Bay High School; Arno D. Wehle, individually and as Superintendent of Williams Bay Schools; Robert R. Brown, individually and as a member of the Williams Bay Board of Education; Elmer M. Hansen, individually and as a member of the Williams Bay Board of Education; Marilyn Prugh, individually

and as a member of the Williams Bay Board of Education; Harold McCarthy, individually and as a member of the Williams Bay Board of Education; Alice Morava, individually and as a member of the Williams Bay Board of Education.

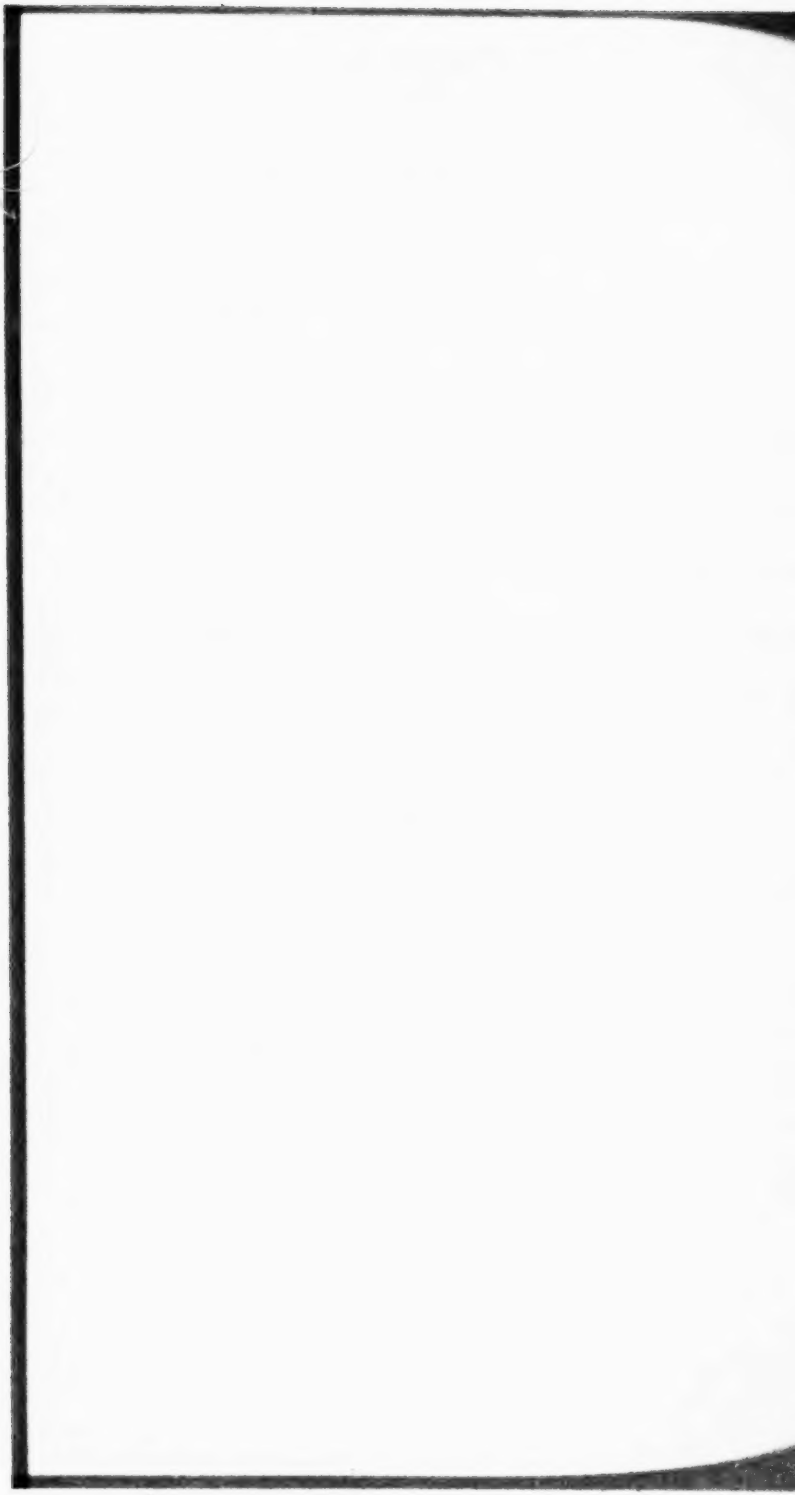
AND WHEREAS, in the term of September, in the year of our Lord one thousand nine hundred and sixty-nine, the said cause came on to be heard before the said United States Court of Appeals for the Seventh Circuit, on the said transcript of record, and was argued by counsel

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

WEDNESDAY, DECEMBER 3, 1969

You, therefore are hereby commanded that such further proceedings be had in said cause, as according to right and justice, and the laws of the United States, aught to be had, the said appeal notwithstanding. WITNESS, the Honorable Warren E. Burger, Chief Justice, of the United States, the fourteenth day of January, in the year of our Lord one thousand nine hundred and seventy.

/s/ Kenneth J. Carrick
Clerk of the United
States Court of Appeals
for the Seventh Circuit



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APPENDIX B

IN THE UNITED STATED DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

THOMAS BREEN, a minor, by his mother and next of friend, Jane Breen; and JAMES A. ANTON, a minor by his parents and next of friend, William and Marie Anton, Plaintiffs v. WILLIAM C. KAHL, individually and as State Superintendent of Public Instruction of the State of Wisconsin; DAVID HAWLEY, individually and as Principal of Williams Bay High School; ARNO D. WEHLE, individually and as Superintendent of Williams Bay Schools; ROBERT R. BROWN, individually and as a member of the Williams Bay Board of Education; ELMER M. HANSEN, individually and as a member of the Williams Bay Board of Education;	OPINION, ORDER AND JUDGMENT 68-C-201

MARILYN PRUGH, individually and as a member of the Williams Bay Board of Education;
HAROLD McCARTHY, individually and as a member of the Williams Bay Board of Education;
ALICE MORAVA, individually and as a member of the Williams Bay Board of Education,

Defendants

- - - - - - - - - - - - - - - - - -

Plaintiffs have brought this action to challenge a regulation promulgated by the Williams Bay Board of Education. They seek a declaration that the regulation violates the Constitution of the United States, and an injunction against its continued enforcement.

Jurisdiction is asserted under 42 U.S.C. § 1983, and 28 U.S.C. §§ 1343 (3) and (4), among other provisions. Jurisdiction is present. The defendants have acted, and they threaten to act, under color of law to deprive each of the plaintiffs of certain freedom of action. The central issue is whether the freedom involved is among the rights, privileges, or immunities secured to plaintiffs by the Constitution of the United States.

Trial has been had to the court, without a jury. Testimony, both by deposition and otherwise, and documentary evidence were received. Briefs have been filed and oral argument heard.

My findings of fact and conclusions of law appear in this opinion. Rule 52(a), Federal Rules of Civil Procedure.

As of September, 1968, the plaintiff Breen was enrolled as an eleventh grade student, and the plaintiff Anton was enrolled as a twelfth grade student, in the Williams Bay High School. Five of the defendants are members of the Williams Bay Board of Education (hereinafter, the Board) which, during the preceding academic year, had adopted this regulation affecting male students in the high school:

> "Hair should be washed, combed and worn so it does not hang below the collar line in the back, over the ears on the side and must be above the eyebrows. Boys should be clean shaven; long sideburns are out."

The regulation has continued in force until the present.

APPENDIX B

Each plaintiff was expelled by the Board in early autumn, 1968, for the stated reason that the length of his hair exceeded the Board's standard. Plaintiff Anton had his hair cut to comply and he was readmitted. At the time of trial, he desired to allow it to grow to a length which would be in violation. The defendant Board members threatened that he would be expelled again if he did so. Plaintiff Breen has refused to comply and he has been denied readmission until and unless he does comply.

Each plaintiff petitioned the defendant State Superintendent of Public Instruction (hereinafter, the state superintendent) for review of the expulsion order, as permitted by Wisconsin statutes. Following a hearing in the case of plaintiff Anton, the state superintendent terminated the appeal proceeding as moot. Following a hearing in the case of plaintiff Breen, the state superintendent found that Breen had persistently refused to comply with the haircut regulation, and that this

"refusal . . . to obey said rule constituted a disruptive influence or factor within the school. . . ."[1] Citing Ferrell v. Dallas Independent School District, 261 F. Supp. 545 (N.D. Texas, 1966), affirmed 392 F.2d 697 (5th Cir., 1968), cert. den., 37 U.S.L.W. 3135 (Oct. 15, 1968), the state superintendent concluded that the expulsion was warranted, and he affirmed it. This action against him, the members of the Board, the principal of the Williams Bay High School (hereinafter, the principal), and the Superintendent of Schools in Williams Bay (hereinafter, the local superintendent) ensued.

The length of plaintiff Breen's hair at the time of his expulsion exceeded the Board standard, as the Board asserted, and it has continued to exceed that standard. The length of plaintiff Anton's hair at the time of his expulsion exceeded the Board standard, as the Board asserted, and at the time of the trial

[1] It should be noted that the state superintendent did not find that the length of the hair of either plaintiff was a disruptive influence or factor, but only that Breen's refusal to obey the rule was disruptive. This distinction is discussed hereinafter.

he did intend to permit it again to reach a prohibited length. No basis for the expulsion of Breen, or for the expulsion or for the threatened expulsion of Anton, is asserted, and in the record in this action none appears, other than a violation or threatened violation of the haircut regulation. The record contains no suggestion that the length of the hair constituted a health problem or a physical obstruction or danger to any person; I find that it did not. At no time while either plaintiff was in attendance in the high school with hair longer than the Board standard was any disruption or disturbance caused by the length of his hair. It is not suggested that the appearance of either plaintiff at any time, by reason of the length of his hair, was obscene. I find that the appearance of neither has been obscene, and that the appearance of plaintiff Anton, solely because the length of his hair may exceed the Board standard, would not be obscene.

I find that the dress and hair styles of the males in Williams Bay, generally, are conservative by current standards, and that few, if any, males in Williams Bay wear their hair at lengths which exceed the Board standard.

I find that to deny a 16 year old eleventh-grade male and a 17 year old

twelfth-grade male access to a public high school in Wisconsin is to inflict upon each of them irreparable injury for which no remedy at law is adequate. I make this finding by taking judicial notice of the social, economic, and psychological value and importance today of receiving a public education through twelfth grade.

Plaintiffs make no contention that the Board regulation is too vague. The complaint includes a contention that the Board's "dress code" is "overbroad on its face." I conclude that the provision of the code relating to hair styles, quoted above, is a discrete and independent section of the dress code. It may or may not be valid, but it is not "over" broad. Plaintiffs raise no contention here that procedural due process has been denied.

The issue is squarely raised: Does the Board regulation as applied to these plaintiffs violate the Constitution of the United States?

To achieve perspective, it may be useful to consider the validity of a similar regulation which might be applicable to adults: for example, a state statute or city ordinance making it punishable by fine or imprisonment for a male inhabitant to wear a beard;

or, for example, a statute or ordinance denying enrollment in a public adult education class in bookkeeping to males whose hair exceeds a certain length; or,for example, a statute or ordinance forbidding access to public buildings or parks to adult females whose hair exceeds a certain length.

It defies credulity that a legislature or council would promulgate such a regulation. But if it should, it seems clear that the regulation would fall.

If, for adults, wearing one's hair at a certain length or wearing a beard is viewed in part as a form of expression, that is, as a "course of conduct" in which "'speech' and "nonspeech' elements are combined", only a "sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." United States v. O'Brien, 391 U.S. 367, 376 (1968). ". . . [A] government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged

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First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S., at 377. Presumably, justification of the kinds of regulations of the hair styles or beards of adults, which I have hypothesized above, would be asserted in terms of the power of the state to regulate matters of health or safety, or perhaps, with respect to the adult education class, education. It cannot seriously be supposed that, with respect to adults, the regulations would be considered "no greater than is essential to the furtherance" of "an important or substantial governmental interest".

Whether wearing one's hair at a certain length or wearing a beard is a form of constitutionally protected expression is not a simple question.[2]

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[2] Plaintiffs' complaint here denies that they are expressing disrespect for authority or for the "Establishment" (although one of them testifies that his conduct may have grown into that because the regulation itself appears to him to be arbitrary and capricious). But they do assert that wearing their hair in a certain manner is a form of self-expression protected by the First Amendment.

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Unquestionably, it is an expression of individuality, and it may be, although the record in this case is silent on the subject, that the manner in which many younger people now wear their hair is an expression of a cultural revolt.[3] In the view I take of this matter, however, it is unnecessary to reach a conclusion whether wearing one's hair at a certain length or wearing a beard falls within that category of "expression" protected by the First Amendment.

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[3] The record here includes a deposition (taken at the instance of the defendants) by a principal of a public high school in a city about five miles from Williams Bay. In apparent seriousness he testifies: that "extreme hair styling" on boys especially "symbolizes something that I feel is not in the best interests of good citizenship"; that "whenever I see a long-hair youngster he is usually leading a riot, he has gotten through committing a crime, he is a dope addict or some such thing"; that "anyone who wears abnormally long hair, to the decent citizenry, immediately reflects a symbol that we feel is trying to disrupt everything we are trying to build up and by we I mean God-fearing Americans"; that the students at his high school share his opinion "that long hair symbolizes revolution, crime, and dope addiction"; that in

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[3][cont'd] his opinion "wearing long hair is un-American" in this day and age; and that its symbolism renders long hair a distraction. The "distraction" matter will be discussed hereinafter (although I mention here that it is difficult to see why hair styles which symbolize bad things are more distracting than those which symbolize good things). To the extent, however, that defendants may be contending that the state may suppress conduct precisely because it does express disapproved attitudes, the contention must fail. The First Amendment surely protects general expressions of opinion in favor of "revolution, crime, and dope addiction".

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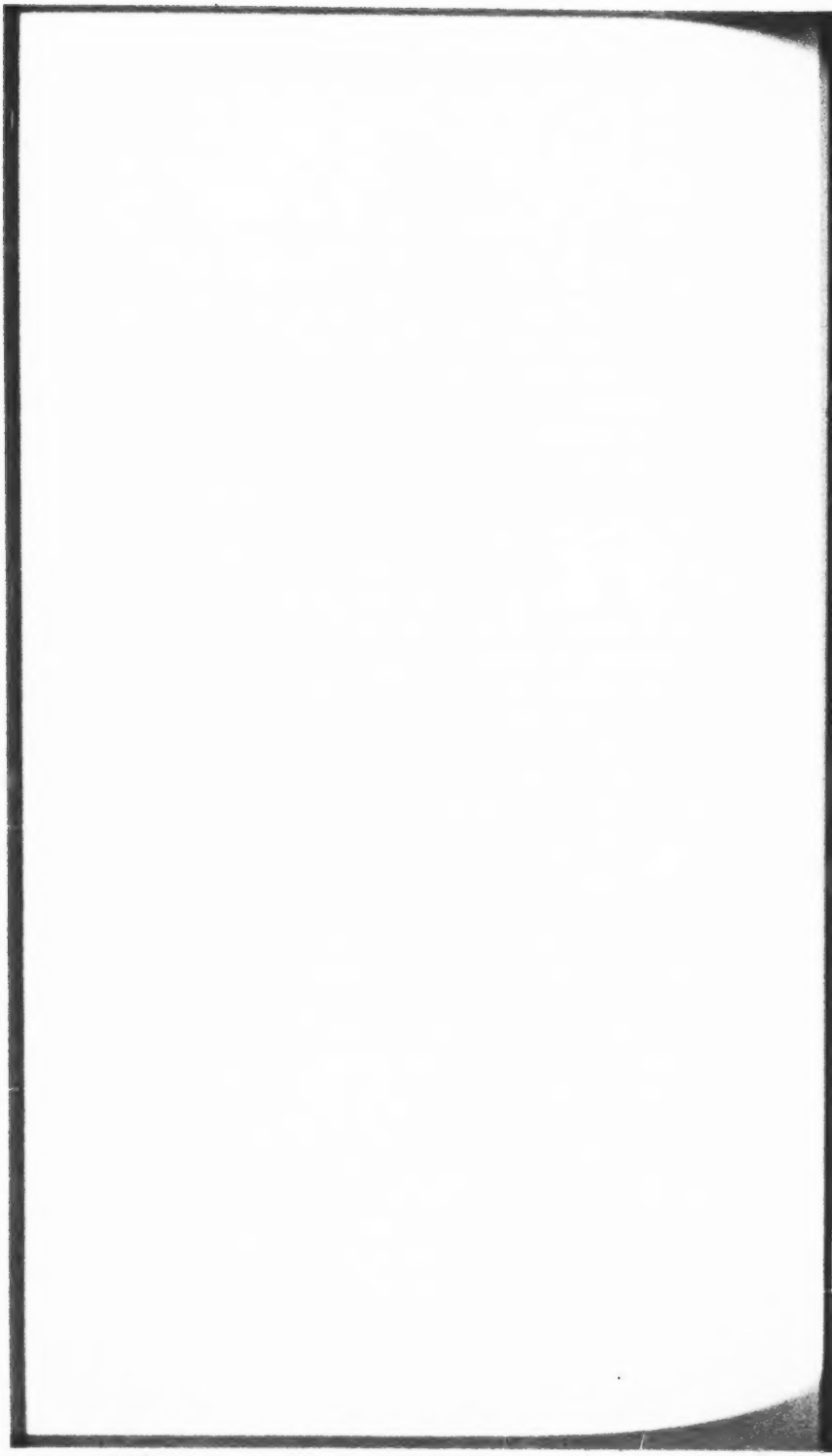
In my view, with respect to adults, freedom to wear one's hair at a certain length or to wear a beard is constitutionally protected, even though it expresses nothing but individual taste. Difficulty might arise, as it did in Griswold v. Connecticut, 381 U.S. 479 (1965) in determining which provision of the Constitution of the United States would be offended by such a regulation with respect to adults. Despite the difficulty, the Court there reached an inevitable judgment: that the freedom of a husband and wife to use contraceptives is a highly protected freedom. The opinion of the Court and the concurring opinions imply, or state, that a statute which rudely invades such a highly protected freedom does not enjoy the usual presumption of constitutionality; on the contrary, the state's subordinating interest in the regulation must be compelling, concurring opinion of Mr. Justice Goldberg, at 497, and the statute bears "a substantial burden of justification", concurring opinion of Mr. Justice White, at 503. See McLaughlin v. Florida, 379 U.S. 184, 196 (1964) (involving the right not to be discriminated against because of race).

Equally inevitable, I believe, would be a judgment that the freedom of an adult male or female to present himself



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or herself physically to the world in the manner of his or her choice is a highly protected freedom. An effort to use the power of the state to impair this freedom must also bear "a substantial burden of justification", whether the attempted justification be in terms of health, physical danger to others, obscenity, or "distraction" of others from their various pursuits. For the state to impair this freedom, in the absence of a compelling subordinating interest in doing so[4], would offend a widely shared concept of human dignity, would assault personality and individuality, would undermine identity, and would invade human "being". It would violate a basic value "implicit in the concept of ordered liberty", Palko v. Connecticut, 302 U.S. 319, 325 (1937). It would deprive a man or a woman of liberty without due process of law in violation of the Fourteenth Amendment. See Griswold, 381 U.S., at 499-500 (Harlan, J., concurring).

The question here is whether this indignity, intolerable if imposed upon adults in the general society, may be visited upon these plaintiffs.

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[4]A comment upon the military and upon penal institutions is made hereinafter.

Defendants contend that it may: first, because plaintiffs are students in a public school; and, second, because plaintiffs are no more than 16 and 17 years of age. Neither reason, standing alone, is sufficient. As I have stated, similar regulations applicable to men and women attending a public adult education evening class in bookkeeping would undoubtedly fall. So would a similar regulation applicable to pre-school children or to a sixteen year old who (in some parts of Wisconsin[5]) is no longer obliged to attend school and who may be employed on a farm or in a factory.[6]

We come then to the basis upon which this application of state power to these plaintiffs must ultimately be asserted: the combination of circumstance that they are enrolled in a public school and also that they are no more than 16 and 17 years of age.

Wisconsin statutes vest in the local Board the management of the affairs of the school district. Sec. 120.12(1),

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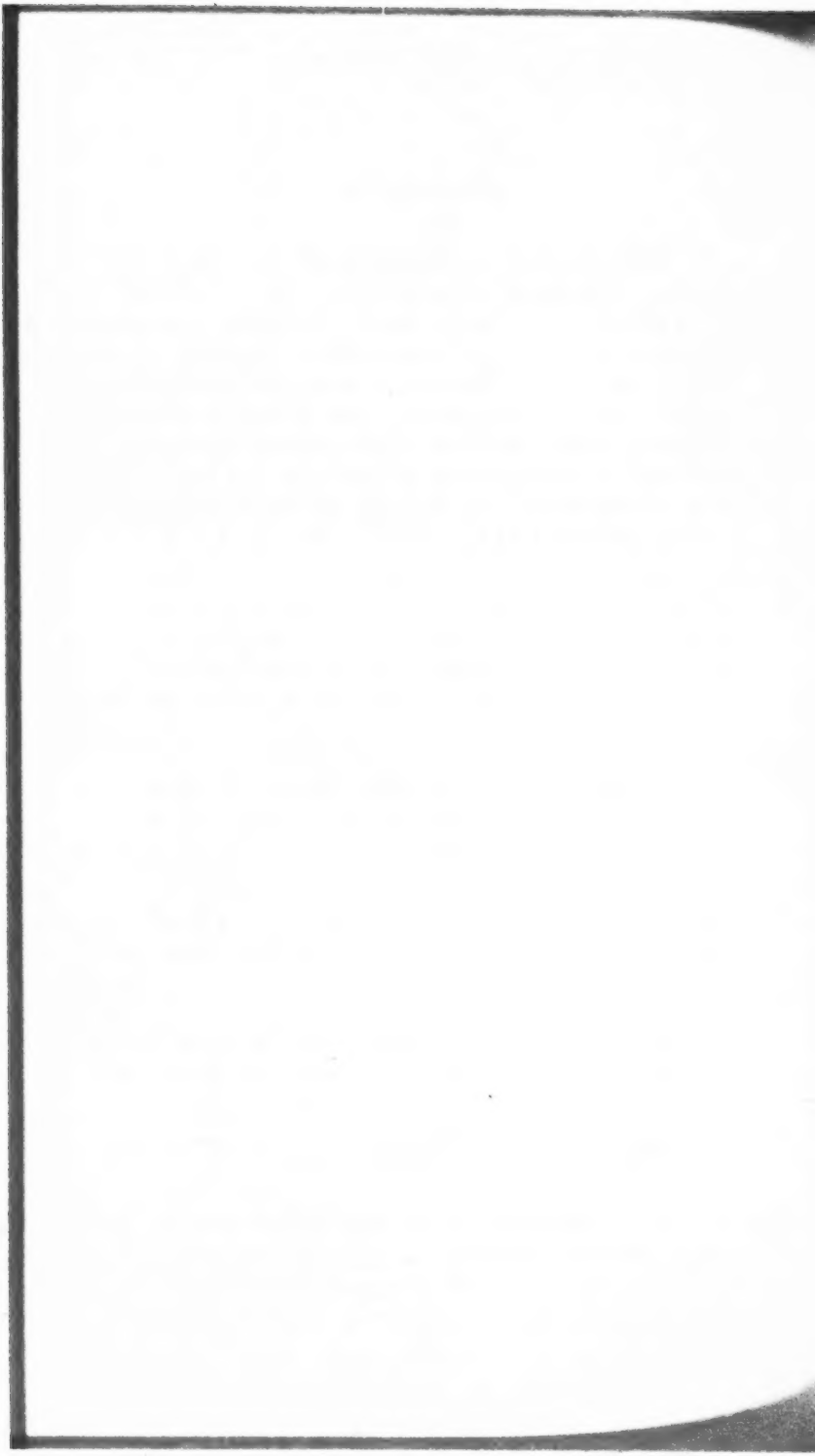
[5]Sec. 118.15, Wis. Stat.

[6]It should be noted that school regulations concerning hair styles necessarily affect the student while he is outside the school as well as within it.



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Wis. Stat. The Board is empowered to make rules for the government of the schools in the district. Sec. 120.13(1). The Board may expel a pupil who has persistently refused or neglected to obey a Board rule if the interest of the school demands his expulsion. Sec. 120.13(3).[7]

One general contention advanced by the defendants and by their witnesses is that this authority is vested in the Board, that the Board has chosen to exercise its authority with respect to this regulation affecting the length of students' hair, that the very failure by a student to respect any Board regulation is a cause of disruption in the school, that learning to respect authority is a part of the education of the students, and that judicial interference with the Board's authority will itself result in further disruption in this school and other schools.

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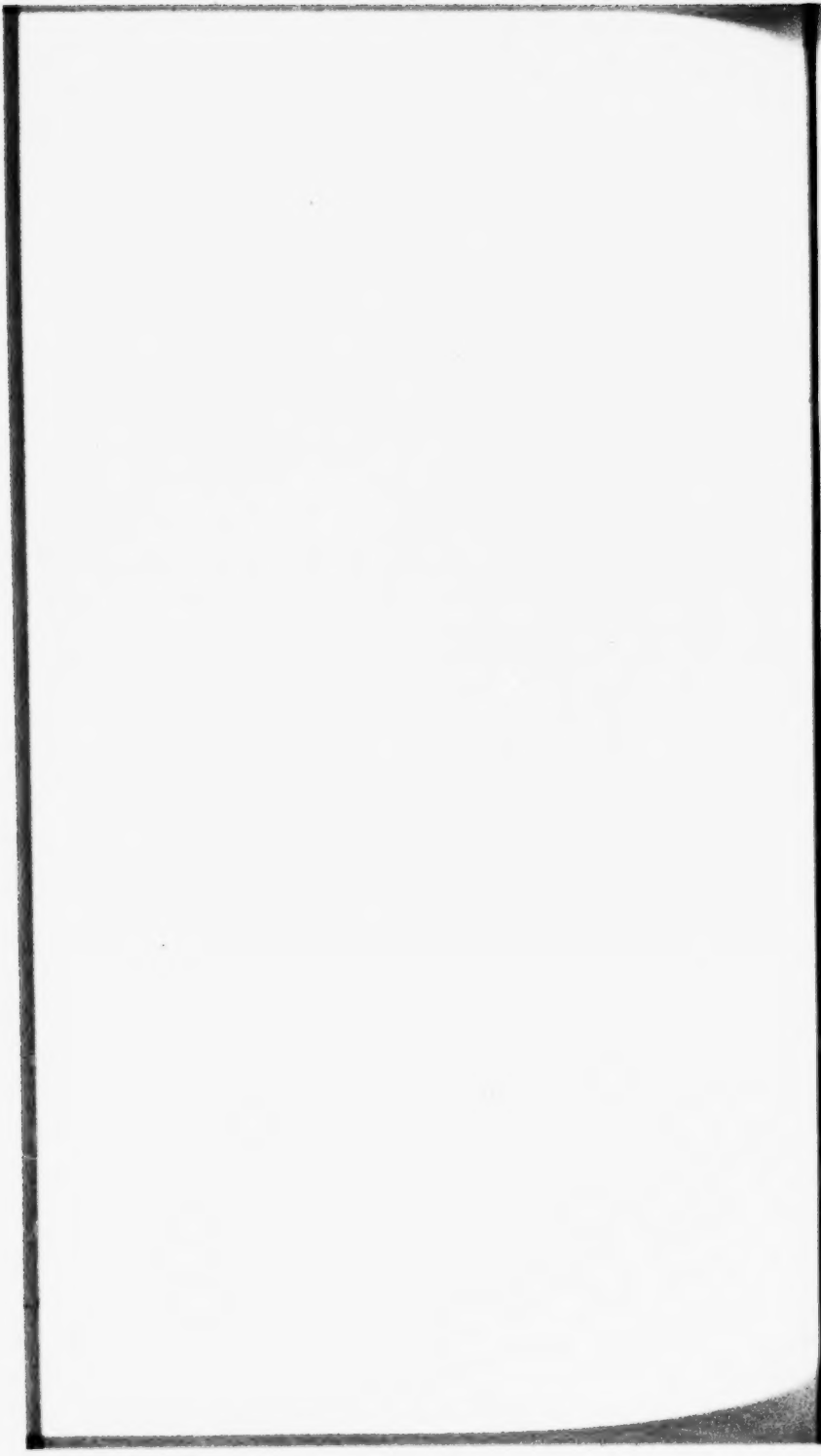
[7]Similar powers are granted, expressly or by implication, with respect to adult education, to a state board of vocational, technical and adult education, Wis. Stat., secs. 15.94, 15.941, and 41.13, and to local boards of vocational and adult education, sec. 41.15.



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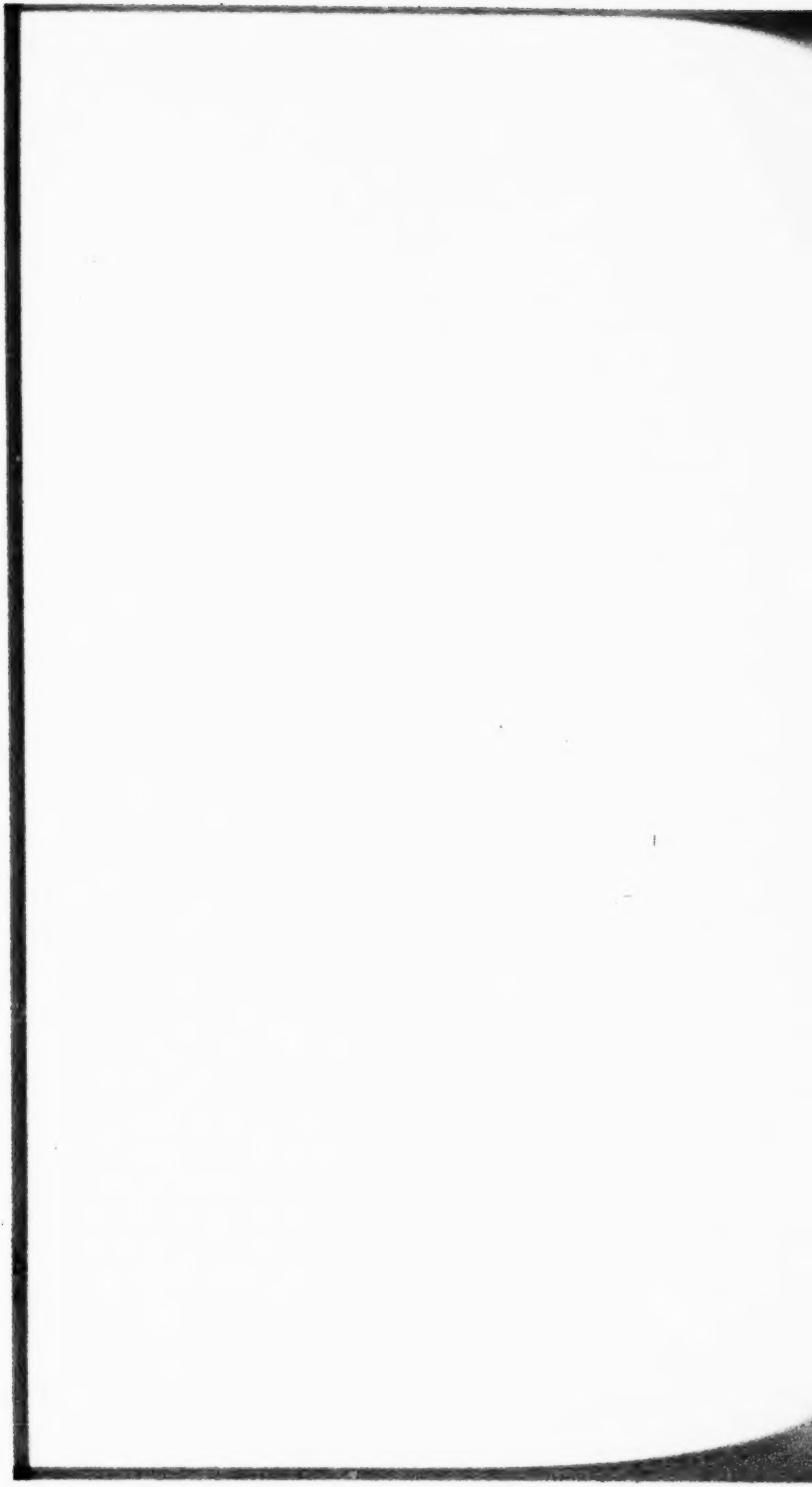
That the courts should not casually interfere with the functions of other public agencies is a proposition so clear as to require neither repetition nor emphasis. Very recently, we were reminded:

> "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

But it must not be forgotten, however small the community, however familiar to one another the characters in the drama, that when a school board undertakes to expel a public school student, it is undertaking to apply the terrible organized force of the state, just as surely as it is applied by the police, the courts, the prison warden, or the militia. In



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the passage just quoted from Epperson, the Court quoted with approval the proposition that the "vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." Shelton v. Tucker, 364 U.S. 479, 487 (1960). In Board of Education v. Barnette, 319 U.S. 624 (1943), the Court met head-on the question whether the courts may and should intervene when liberty in public elementary and secondary schools is threatened by a regulation promulgated by a state board of eduction. It rejected the contention that it should refrain from interference with the school board's functions, observing that school boards have "important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights." 319 U.S., at 637. It rejected the contention that it should refrain from entering a field "where courts possess no marked and certainly no controlling competence", Minersville District v. Gobitis, 310 U.S. 586, 597-598 (1940); it commented that its duty to apply the Bill of Rights to assertions of official authority depends not upon the Court's possession of marked competence in the field where the invasion of rights occurs, "but by force of our commissions":

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> "We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed." 319 U.S., at 638-640.

The judgment of the district court enjoining enforcement of the school board regulation was affirmed.

To suggest that the public secondary schools should be immune from this constitutional scrutiny by the courts, with respect to the regulation of the length of students' hair, is to suggest a parallel between the public schools, on the one hand, and the armed forces or a penal institution, on the other. Fortunately, I am not called upon to pass upon the familiar practice of imposing stringent standards of personal appearance in the latter institutions. The practice, presumably, is rooted in considerations of discipline or esprit de corps, with respect to the military, and, with respect to penal institutions, in considerations of discipline or deliberate degradation of inmates. Of these considerations, the defendants have suggested discipline alone as a consideration appropriate to the schools. Even with respect to discipline, I do not understand them to contend that short

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haircuts may be required of high school students solely as an exercise of authority for its own sake and submission to authority for its own sake. The point made about discipline seems to be that the disciplinary powers of the school authorities will be diminished if this Board regulation is not upheld and these expulsions and threatened expulsions are not vindicated by the court.

Obviously the relationship of students, faculty, administrators, and school board will be affected in some degree by a judicial declaration of invalidity of a school board regulation. But if the regulation is fairly found to violate the Constitution, responsibility for these consequences rests with the agency which promulgated the regulation. So far as education of young people in obedience is concerned, it is important for them to appreciate the present vitality of our proud tradition that although we respect government in the exercise of its consitutional powers, we jealously guard our freedoms from its attempts to exercise unconstitutional powers.[8]

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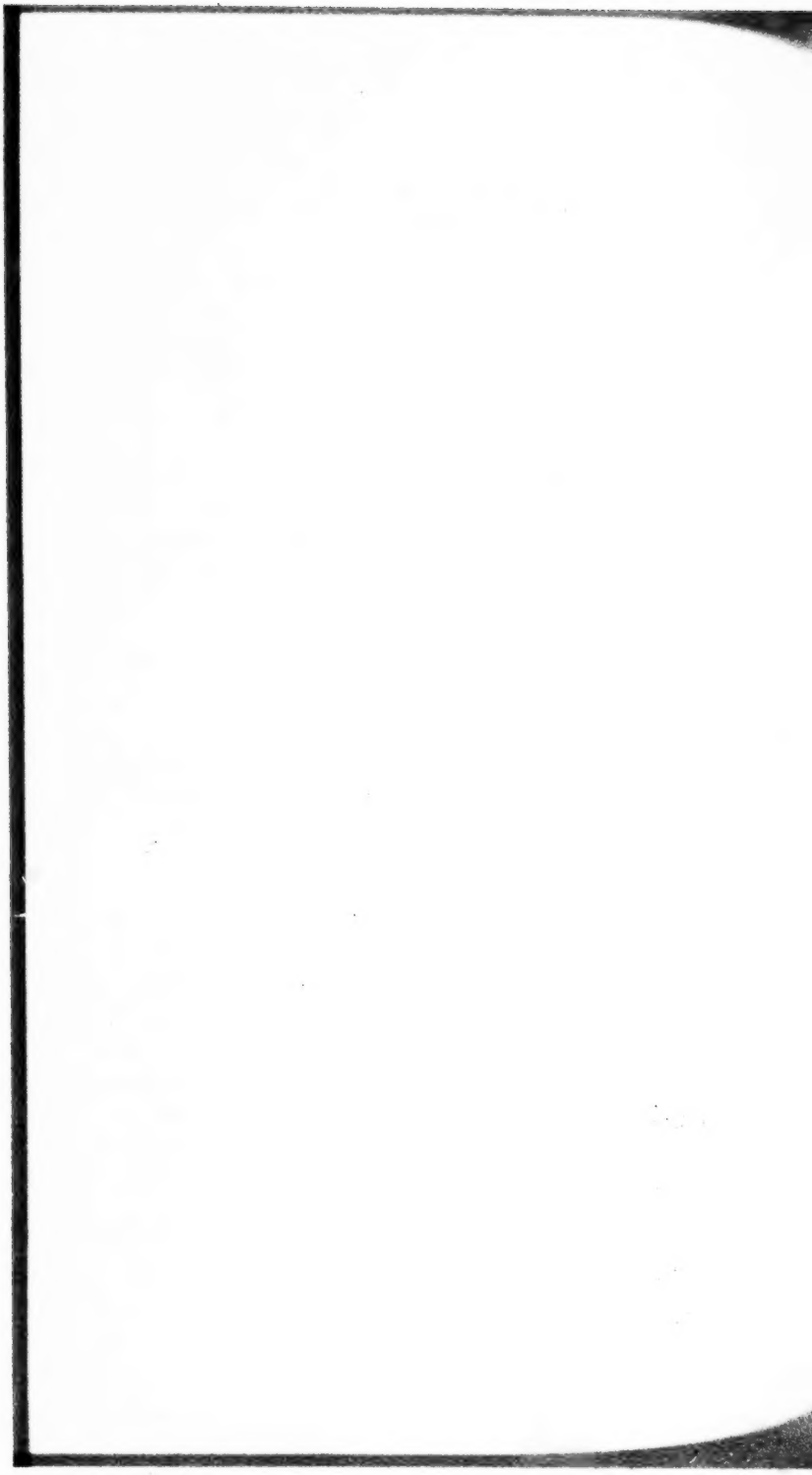
[8]There is a significant distinction between disruption which may be caused by the wearing of long hair, on the one hand,



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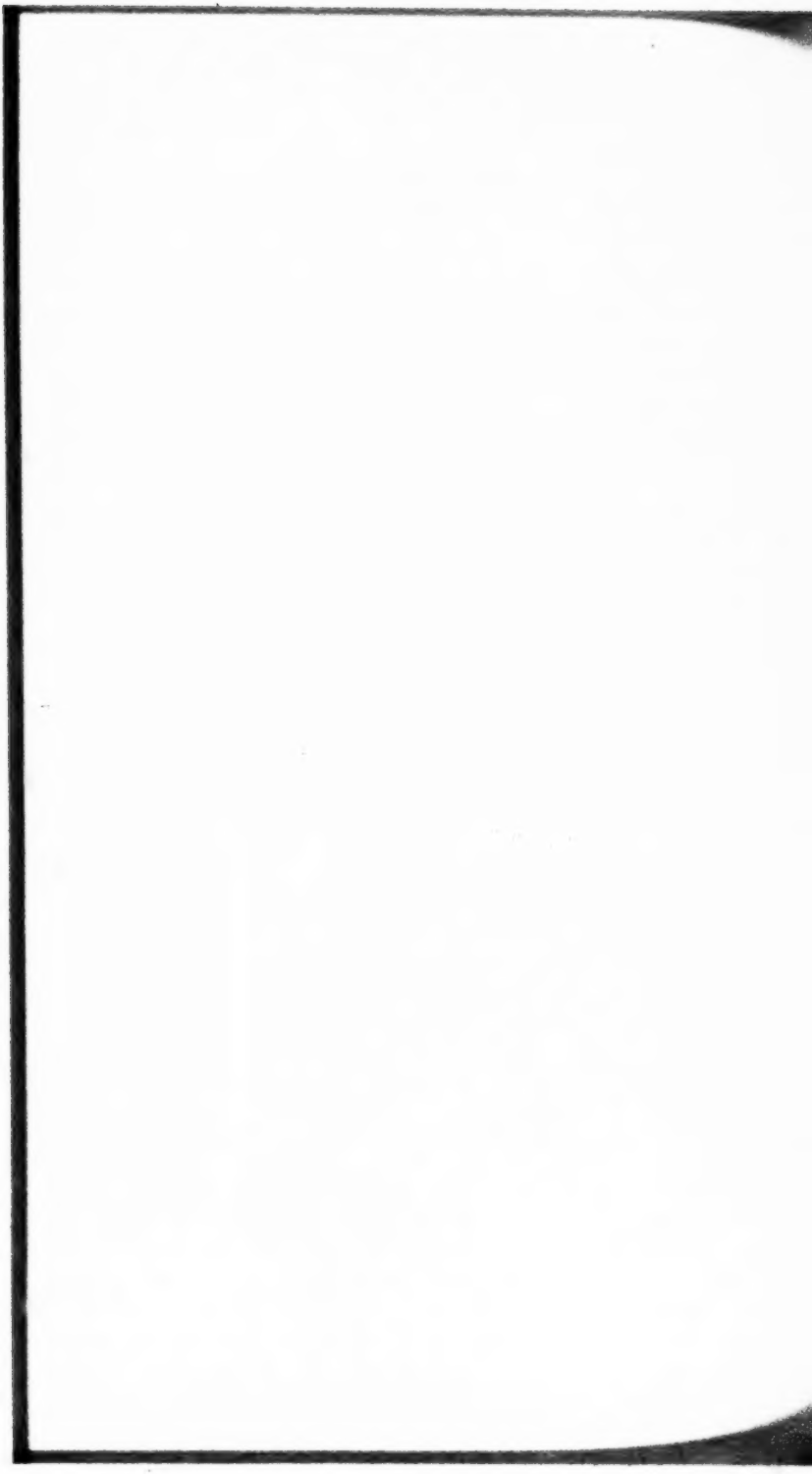
[8][cont'd] and disruption which may be caused by the very fact that a student has violated any Board rule, on the other. That disruption of the latter type may occur obviously affords no support for constitutionality of the regulation itself. For this reason I consider that the finding of the state superintendent, even if it were to be wholly accepted here, affords no support for the validity of the challenged Board regulation. See n. 1 supra and the related text.



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I am aware that other courts have rejected challenges to similar school regulations by characterizing the issue as political or social, or by declining to involve the courts in a thicket best left to the school boards. Ferrell v. Dallas Independent School District, 261 F. Supp. 545 (N.D. Texas, 1966), affirmed 392 F.2d 697 (5th Cir. 1968), cert. den., 37 U.S.L.W. 3135 (Oct. 15, 1968); Davis v. Firment, 269 F. Supp. 524 (E.D. La., 1967); Leonard v. School Committee of Attleboro, 349 Mass. 704, 212 N.E. 2d 468 (1965). But the students who are subjected to these regulations do not vote in school board elections; political redress of their grievances is not open to them; theirs is a situation in which judicial vindication of constitutional protections has been considered particularly appropriate. Edwards v. California, 314 U.S. 160, 174 (1941); South Carolina Highway Dept. v. Barnwell Bros., 303 U.S. 177, 185, n.2 (1938). See NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 191 (1967). Cautious counsel to avoid judicial involvement in serious constitutional issues merely because they concern younger people, in my view, is neither prudent, expedient, or just. It is time to broaden the constitutional community by including within its protections younger people whose claim to dignity matches that of their elders. See In re Gault, 387 U.S. 1 (1967).

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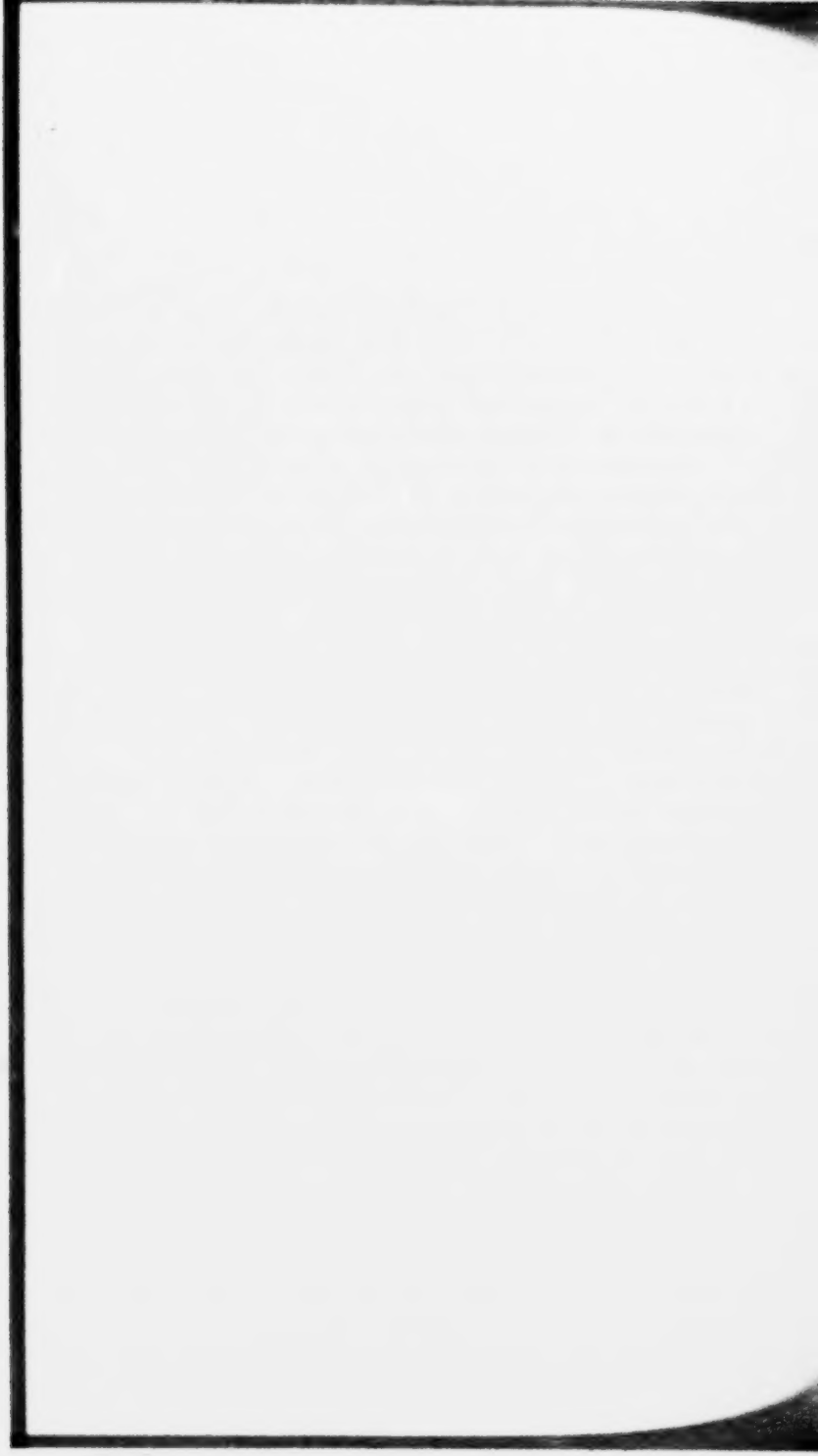
I consider myself obliged, therefore, to determine whether the defendants have met the "substantial burden of justification" of this regulation which invades a freedom deserving a high degree of protection. Although variously stated by the witnesses and counsel, the asserted justifications may be summarized as follows: (1) that in Williams Bay a male high school student whose hair is longer than the Board standard so departs from the norm that his appearance distracts his fellow students from their school work; and (2) that students whose appearance conforms to community standards perform better in school, both in strictly academic work and in extra-curricular activities, than those whose appearance does not conform.

If the truth of both justifications were to be accepted, questions would nevertheless abound: Is it a desirable objective of our public schools to eliminate diversity within the school in order to eliminate distraction? On the contrary, is it not more vital to encourage experience with diversity and adaptation to it, in a diverse nation and world, than to encourage homogeneity? From the proposition that



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conforming students perform better than nonconforming students, does it follow that the performance of nonconforming students will improve if by threat of expulsion they are forced to conform?

But these are questions which one hopes would be raised by school board members, administrators, teachers, parents, and students. The question here is whether the defendants have carried the "substantial burden of justification."

With respect to the "distraction" factor, the showing in this record consists of expressions of opinion by several educational administrators that an abnormal appearance of one student distracts others. There is no direct testimony that such distraction has occurred. There has been no offer of the results of any empirical studies on the subject by educators, psychologists, psychiatrists, or other experts. Even in the opinions which have been received in evidence, there has been no amplification with respect to what portion of the students are susceptible to such distraction, how frequently susceptible students are likely to be distracted for this reason, how quickly or slowly high school students accommodate to individual differences in appearance, or

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how the distraction actually manifests itself in terms of the behavior of the distracted students in various learning situations. From the testimony of the educational administrators, it appears that the absence of such amplification is not accidental; it arises from the absence of factual data which might provide the amplification.[9]

With respect to the "comparative performance" factor, this record is equally barren. The expert opinions are fewer than those on the distraction factor. No empirical findings are offered. No hard facts are adduced even from a limited sample to demonstrate that the academic performance of male students with long hair is inferior to that of male students with short hair, or that the former are less active or less effective in extra-curricular activities.

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[9]The testimony of plaintiffs' expert was to the effect that the literature in educational psychology, at present, does not support the conclusion that students are seriously distracted for any significant interval by the unusual appearance of a fellow student. However, I make no finding on the factual question. I conclude only that defendants have failed to meet the "substantial burden of justification".

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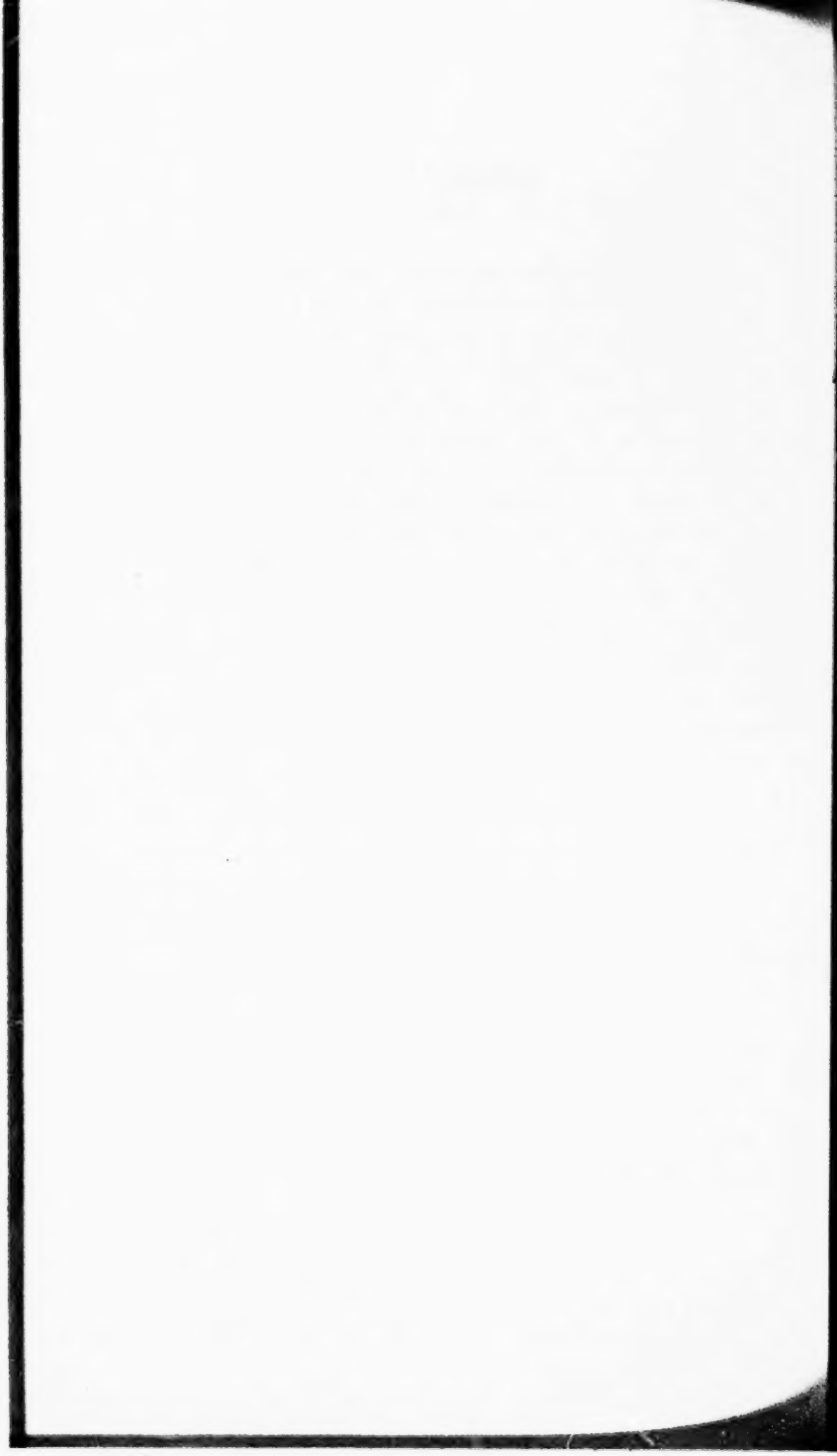
In many situations, no doubt, whether "a substantial burden of justification" of a regulation has been met is a delicate and uncertain matter. This is not such a situation. Defendants here have fallen far short of showing that the distraction caused by male high school students whose hair length exceeds the Board standard is so aggravated, so frequent, so general, and so persistent that this invasion of their individual freedom by the state is warranted. The same is true of defendants' showing with respect to the differential in school performance between male students with long hair and those with short hair.

Upon the entire record herein, and for the reasons given in this opinion:

It is hereby adjudged that the regulation of the Williams Bay Board of Education limiting the length of male students' hair, requiring male students to be clean shaven, and prohibiting long sideburns, violates the due process clause of the Fourteenth Amendment to the Constitution of the United States, and is null and void.

It is further ordered that the defendants are enjoined from continuing to enforce the said regulation of the Board, or from initiating the suspension



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or expulsion of either of the plaintiffs from the Williams Bay High School solely by reason of violation of the said regulation.

It is further ordered that each of the plaintiffs is to be reinstated as of February 24, 1969, or continued, as the case may be, as a student in the Williams Bay High School, with the same rights, privileges, and immunities as those which attached to his status as a student in said school prior to his suspension or expulsion.

It is further ordered that there shall be expunged from the Williams Bay High School records any notation revealing disciplinary action heretofore taken against each of the plaintiffs by reason of the said Board regulation.

It is further ordered that the plaintiffs are awarded their statutory costs and disbursements herein.

Entered this 20th day of February, 1969.

By the Court:

/s/James E. Doyle
District Judge

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

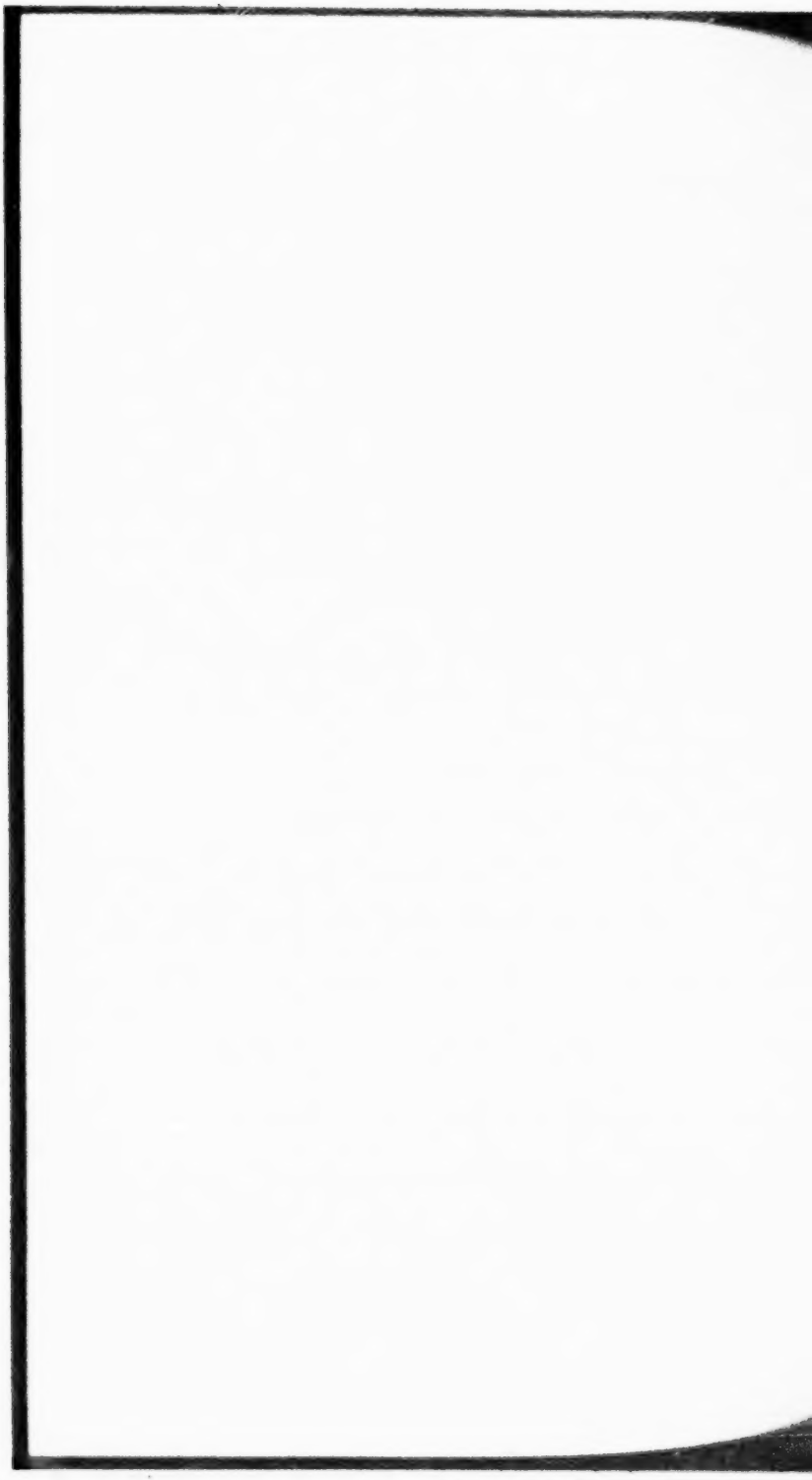
WILLIAM C. KAHL, Petitioner,

v.

THOMAS BREEN, a minor, by his mother and next of friend, Jane Breen; and JAMES A. ANTON, a minor by his parents and next of friend, William and Marie Anton, Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March, 1970, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid to: Sander N. Karp and Melvin F. Greenberg, 303 State Street, Madison, Wisconsin 53703, and



BLEED THROUGH POOR COPY

Percy L. Julian, Jr., 330 East Wilson Street, Madison, Wisconsin 53703, counsel for respondents. I further certify that all parties required to be served have been served.

ROBERT D. MARTINSON
Department of Justice
State Capitol
Madison, Wisconsin 53702

Counsel for Petitioner